

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. SCHUCH and U.S. POSTAL SERVICE,
POST OFFICE, Moline, Ill.

*Docket No. 95-2229; Submitted on the Record;
Issued March 5, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly found that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 14, 1987 appellant, a letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she experienced tense muscles in the neck, a headache and numbness after being involved in an automobile accident.

The Office accepted appellant's claim for acute myocervical back strain and chronic cervical musculature strain with headaches.

On May 9, 1988 appellant filed a claim (Form CA-2a) alleging that on December 5, 1987 she experienced a recurrence of disability. Appellant stopped work on May 2, 1988.

By decision dated September 26, 1988, the Office found the evidence of record insufficient to establish that appellant's condition was caused by the April 14, 1987 employment injury. In an October 19, 1988 letter, appellant requested reconsideration of the Office's decision.

By decision dated December 15, 1988, the Office vacated its September 26, 1988 decision inasmuch as the medical evidence of record established a causal relationship between appellant's condition and an April 14, 1987 employment injury.

By decision dated May 8, 1990, the Office found the medical evidence of record insufficient to establish total disability for certain periods covering February 25, 1989 through April 3, 1990.¹

By decision dated September 4, 1990, the Office found the medical evidence of record insufficient to establish total disability for the period April 30 through May 1, 1990.²

By decision dated April 24, 1991, the Office found the medical evidence of record insufficient to establish that appellant was totally disabled during various periods between December 3, 1990 and February 2, 1991.³ In a December 17, 1994 letter, appellant requested reconsideration of the Office's decision.

By decision dated February 28, 1995, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁴ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error." Office procedures provide that the Office will reopen a claimant's case

¹ Appellant filed a claim for continuing compensation on account of disability (Form CA-8) dated June 13, 1989 for the period February 25 through May 5, 1989, a Form CA-8 dated July 3, 1989 for the period May 6 through June 30, 1989, a Form CA-8 dated August 22, 1989 for the period August 1 through 11, 1989, a Form CA-8 dated September 17, 1989 for the period August 12 through September 8, 1989, a Form CA-8 dated March 23, 1990 for the period February 8 through March 23, 1990, and a Form CA-8 dated April 6, 1990 for the period April 2 through 3, 1990.

² Appellant filed a Form CA-8 dated May 14, 1990 for the period April 30 through May 1, 1990.

³ Appellant filed Forms CA-8 dated February 7, 1991 for the period December 3 through 4, 1990 and December 13 through 17, 1990, and a Form CA-8 dated February 7, 1991 for the period January 29 through February 2, 1991.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the part of the Office.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1991). The Office therein states:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁷ See *Leona N. Travis*, 43, ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41, ECAB 964, 968 (1990).

⁹ Furthermore, the Office's last merit decision, the April 24, 1991 decision, was issued more than one year prior to the dated appellant filed her appeal with the Board on May 30, 1995. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; see 20 C.F.R. § 501.3(d).

¹⁰ See *Leona N. Travis*, *supra* note 7.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *Gregory Griffin*, *supra* note 5.

application for review, but found that it did not clearly show that the Office's prior decision was in error.

More than one year elapsed between the Office's April 24, 1991 decision and appellant's December 17, 1994 request for reconsideration, and the Board finds that the request was untimely filed.¹⁴ The evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of her claim, appellant submitted the December 2, 1994 medical report of Dr. John W. Golden, a Board-certified family practitioner and appellant's treating physician, revealing a history of the April 14, 1987 employment injury, appellant's conditions and medical treatment, and his findings on physical and objective examination. Dr. Golden diagnosed chronic musculoskeletal headaches due to chronic cervical myofascitis and occipital neuralgia. Dr. Golden opined that these conditions arose from the April 14, 1987 employment injury and that appellant's condition would be indefinite in duration, requiring removal from work at times. Dr. Golden failed to provide any medical rationale for his conclusion that appellant's condition was caused by the April 14, 1987 employment injury and Dr. Golden's opinion does not manifest on its face that the Office committed an error in its April 24, 1991 merit decision.

Inasmuch as appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The February 28, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 5, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ Furthermore, the Office's last merit decision, the April 24, 1991 decision, was issued more than one year prior to the date appellant filed her appeal with the Board on May 30, 1995. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; *see* 20 C.F.R. § 501.3(d).